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Chairman: Mr. Lelong ..... (Haiti)

Contents

Agenda item162: Report of the International Law Commission on the work of its fifty-third session

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The meeting was called to order at 10.10 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (A/56/10 and Corr.1)

1. **The Chairman** congratulated the Commission on the progress it had made on all the topics on its agenda. In particular, completion of the draft articles on State responsibility, a topic which had been on its agenda for almost 50 years, would constitute a milestone in its work and in modern international law. The Commission had also completed the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities). The exchange of views between the Committee and the Commission and, recently, the even closer cooperation between them, had given rise to a dialogue of high intellectual calibre and great interest.

2. **Mr. Kabatsi** (Chairman of the International Law Commission) introduced the report of the International Law Commission on the work of its fifty-third session (A/56/10 and Corr.1). In finalizing its second reading of the draft articles on State responsibility, the Commission had been guided by five distinguished jurists from different legal traditions who had served as special rapporteurs. The draft articles developed a clear system for regulating States' obligations in their interactions with other States and, as such, represented an important step towards a global society where respect for the rule of law was paramount.

3. At its fifty-second session, the Commission had taken the unprecedented step of submitting to the General Assembly the text of the draft articles as adopted by the Drafting Committee, thereby giving Governments a further opportunity to comment on them. At its fifty-third session, the Commission had had before it the fourth report of the Special Rapporteur, Mr. James Crawford, which contained a detailed record of comments made by Governments before the Sixth Committee and in writing, together with further written submissions by States; on the basis of those comments, the Commission had finalized its second reading of the draft.

4. The title of the draft articles had been changed to "Draft articles on the responsibility of States for internationally wrongful acts" in order to distinguish the topic from that of the responsibility of the State under international law and that of international liability for acts not prohibited by international law.

5. The title of Part One, chapter II, had been changed to "Attribution of conduct to a State" and the draft articles contained therein had been reordered to improve the internal logic of the chapter.

6. The most significant change in Part One, chapter V ("Circumstances precluding wrongfulness"), concerned the provision on compliance with peremptory norms. The provision had previously appeared as article 21, recognizing compliance with the peremptory norm as a circumstance precluding wrongfulness. However, the Commission had decided to recast the provision in the form of a general exclusion clause to the effect that no State could rely upon a circumstance precluding wrongfulness in respect of conduct which violated a peremptory norm. In so doing, it had departed from its previous approach of dealing with the matter on a case-by-case basis. Furthermore, since the new formulation was applicable to all the circumstances listed in chapter V, it had been decided to place it towards the end of the chapter as new article 26. The Commission had also scrutinized the reference to the "international community as a whole" in article 25 ("Necessity") but had decided to retain the existing version since it had been resorted to by both the International Court of Justice and the General Assembly, the latter in the context of recently adopted international conventions.

7. The Commission had delayed its final approval of Part Two, chapter I, article 30 (b), which established the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so required, because the issue was being considered by the International Court of Justice in the context of the *La Grand* case. However, it had decided to retain both that paragraph and a similar reference in article 48, paragraph 2 (a), on the understanding that the phrase "if circumstances so require" indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts and that in some situations, assurances and guarantees of non-repetition could be provided as a form of the remedy of satisfaction. The Commission had also decided to retain the reference to "injury" in article 31, paragraph 2, and to move former article 33, which dealt with other consequences of an internationally wrongful act, to Part Four as new article 56.

8. The Commission had adopted Part Two, chapter II, in its previous form with some drafting changes, including alignment of the text with the concept of "injury" adopted in article 31.

9. With respect to Part Two, chapter III, at its fifty-second session the Commission had proposed the deletion of the notion of "State crime" and the inclusion of the category of serious breaches of obligation towards the international community as a whole. After considering the matter at length, and in light of comments made by Governments, it had decided to retain the chapter on the understanding that article 42, paragraph 1, of the previous text, which dealt with damages reflecting the gravity of the breach, would be deleted. As part of that compromise, the previous reference to "a serious breach ... of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" had been replaced by "a serious breach ... of an obligation arising under a peremptory norm of general international law"; the Commission had considered that the concept of peremptory norms was well established by virtue of its inclusion in the Vienna Convention on the Law of Treaties.

10. Articles 40 and 41 had been redrafted to reflect those understandings. The scope of article 40, paragraph 1, had been narrowed to cover serious breaches "by a State", and the Commission had decided to delete the previous reference to the risk of "substantial harm to the fundamental interests protected thereby" since a serious breach of a peremptory norm would necessarily imply such risk. The reference to "damages reflecting the gravity of the breach" had been reformulated in order to clarify the consequences of such a breach. There had been some concern that the use of the term "international community as a whole" in the draft articles might be broader than the reference to "the international community of States as a whole" in article 53 of the Vienna Convention; however, the Commission had taken the view that article 53 related to the defining of peremptory norms for the purposes of the Convention; that activity was carried out solely by the "international community of States as a whole", which was an important subset of the "international community as a whole".

11. Whereas the previous year the Commission had included a new Part Two bis on the implementation of State responsibility, which had contained provisions on the procedural and substantive aspects of the invocation of State responsibility, in 2001 the Commission had discarded the section on dispute settlement and retained only the part concerning the implementation of State responsibility. That part had become Part Three, comprising two chapters and 13 articles, which specified what action could be taken by States faced with a breach of an international obligation in order to secure the performance of the obligations of cessation and reparation by the responsible State.

12. In Part Three, chapter I, on the invocation of the responsibility of a State, the Commission had preserved the basic distinction between "injured State" in article 42 and a "State other than an injured State" in article 48, although some aspects had been controversial. Although it had been contended that the existence of "integral" obligations might be limited to multilateral treaties, the Commission had maintained a reformulated version of article 42, paragraph (b) (ii), in recognition of the existence of such a category of obligations, however, narrow, and to maintain a parallelism with article 60, paragraph 2 (c), of the Vienna Convention.

13. When the Commission debated chapter II of Part Three, on countermeasures, it had borne in mind Governments' comments regarding article 54 of the text drafted in 2000. Given the differing views within the Commission on that article, it was decided that what had become article 22, regarding the taking of a countermeasure as a circumstance precluding wrongfulness, would be kept in Part One, chapter V. The chapter on countermeasures had stayed in Part Three, but article 54 of the previous year's text had been deleted and replaced by a saving clause. As a compromise, article 53 of the previous year's draft had become article 52 and reformulated to remove the distinction between the taking of provisional countermeasures and countermeasures proper.

14. Article 50, paragraph 1 (e), of the draft presented in 2000 had become article 50, paragraph 2 (b), which the Commission felt was more logical. Article 52, dealing with conditions relating to the resort to countermeasures, had been recast as part of the broader compromise on countermeasures. That had led to the deletion of paragraph 4 of the previous year's text, the merging of existing provisions and some redrafting.

15. Article 54, which had been reworded as a without-prejudice clause, referred to "lawful measures" rather than "countermeasures" so as not to prejudice the issue either way. While article 22 recognized the taking of "countermeasures" only as a circumstance precluding wrongfulness, it did not per se exclude the possibility that the adoption of "lawful measures", within the meaning of article 54, would likewise preclude wrongfulness.

16. Part Four was largely unchanged, apart from the inclusion of a new article 56. That provision had formerly been article 33, but it had been moved in order to acknowledge its link with article 55 on *lex specialis* and to make it generally applicable to the whole regime of State responsibility.

17. The Commission had pondered the inclusion of provisions on the settlement of disputes, but had rejected that option on the understanding that attention would be drawn to the dispute settlement machinery referred to in the first-reading draft (A/51/10) as a possible means of settling disputes concerning State responsibility and that it would be left to the General Assembly to determine what form of provisions could be included, should it decide to elaborate a convention.

18. The wide-ranging discussion within the Commission about the final form of the draft articles had resulted in the recommendation that the General Assembly should take note of the draft articles on the responsibility of States for internationally wrongful acts in a resolution, to which the draft articles would be annexed, and that it should consider, at a later stage, the holding of a conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic. Furthermore, the Commission had been of the opinion that the issue of dispute settlement could be dealt with by that international conference, if it came to the conclusion that a legal mechanism for that purpose should be provided in connection with the draft articles.

19. The Commission had adopted a resolution by acclamation in which it recognized the invaluable contribution of the Special Rapporteur to articles which, it believed, would prove to be a major contribution to the codification and development of an important part of international law.

20. **Mr. Wood** (United Kingdom) said that his enthusiasm for the rigour and clarity of the Commission's work on important issues and for its careful analysis of State practice and case law had been vindicated by the completion of the draft articles on the responsibility of States for internationally wrongful acts.

21. The topic of State responsibility was of the highest importance, as was evidenced by the fact that the Commission's earlier drafts had been cited in judgements and advisory opinions of the International Court of Justice. He often referred to the draft articles and commentaries thereto because, although the subject might seem very abstract, it was fundamental to the structure of international law and international relations.

22. While it would be premature to say much in detail about the substance of the draft, the provisions on countermeasures represented a significant improvement. Nevertheless his delegation had some concerns about the article on necessity, since the concepts of "serious breaches" and "obligations owed to the international community as a whole" were vague. The commentaries, on the other hand, shed much light on the draft articles and were a useful contribution to an understanding of the law.

23. Since his delegation thought that the text of the draft articles required reflection and study, it reserved its position on future action concerning the text. It concurred with the first part of the Commission's recommendation, but considered it unwise to convene a conference on such specialized and delicate material. An opportunity was needed for the further development of that area of the law through State practice and case law. The adoption by the General Assembly of a consensus resolution annexing the draft articles and commending them to States would carry great weight and give the articles an appropriate status.

24. **Mr. Koskenniemi** (Finland), speaking on behalf of Denmark, Iceland, Norway, Sweden and Finland, said that State responsibility, as it was construed by the Commission, was the widest and potentially the most significant subject it had ever dealt with, and that was why some fundamentally diverging convictions existed about its place in the international legal system. Some people held that State responsibility stemmed from bilateral relationships and that a breach concerned only two States, or two groups of States, the holder(s) of a right and the State(s) that had violated that right. That view was reflected in many ways in the current draft, where the injured State played a key role in that it had

to invoke responsibility, choose what form reparation should take and decide what countermeasures, if any, should be adopted. Under article 20, it could even relieve the other State of responsibility by consenting to an act that would otherwise have constituted a breach.

25. While that was a realistic way to codify the present state of customary law on the matter, State responsibility had also always been regarded as an element of international relations where States not only competed with one another like gladiators, but were accountable to an international community of States as a whole. The latter notion of responsibility, which was denoted by the Latin terms *jus cogens* or *erga omnes* obligations, was disputed because of the suggestion that there might be a role for others apart from the injured State and the State committing the breach. The two different positions had always proved to be irreconcilable whenever the issue of international crimes and the taking of countermeasures by States that were not directly injured had been deliberated. Professor Ago had argued that since the Second World War there had been growing recognition that some norms were more important than others, and that that distinction should be reflected not only at the level of primary rules, but also in the consequences of infringements of those norms. Sir Hersch Lauterpacht had envisaged the subject as an international equivalent to domestic criminal law and had underpinned his argument that codification was necessary by pointing to developments such as the criminal responsibility of States and that of individuals acting on behalf of the State.

26. The quarrel over the distinction between "normal" and "more serious breaches" had been the single most important disagreement throughout the Commission's debates. Professor Ago had proposed that a distinction should be drawn between regular delicts and breaches of more fundamental norms and, while international lawyers had generally maintained that a hierarchy of norms did exist, they had been unable to agree what norms were most important and what the consequences of their infringement might be. The idea of punitive damages had been dismissed as unacceptable.

27. The compromise of 2001 made no mention of criminal responsibility, but in a number of articles it did highlight the existence of peremptory norms and obligations owed to the international community as a whole. It did not, however, identify those norms or obligations and provided for only very limited consequences of a breach thereof. The vexed question of countermeasures by States not directly injured had been dealt with by a clause that left the issue open for further development. Like any good compromise, the Commission's text could be called a victory of both the bilateralist and the communitarian schools.

28. The Nordic delegations were willing to accept the provisions of Part Three, chapter II, on countermeasures. Although resort to countermeasures was a matter of extreme delicacy, their use could not be ruled out, and the draft would be incomplete if it did not mention them. There had been no serious disagreement about the principle embodied in article 22 precluding the wrongfulness of an act that would otherwise constitute a breach, if taken as a lawful countermeasure.

29. The problem had been to allow for the use of countermeasures while ensuring against their abuse. Although it might seem best for countermeasures to be administered through international organizations, that approach would imply a centralized system of enforcement that did not yet exist. Since enforcement would therefore remain bilateral, most of Part Three, chapter II, was concerned with the limitations on countermeasures and attempted to reconcile the objectives of exhaustiveness, by including all relevant considerations governing their acceptability, and flexibility, by allowing for unforeseeable situations. Ideally, dispute settlement should have been given a stronger position in the system, but that would have required a greater willingness than States had yet shown to submit to a binding jurisdiction. Interpretation of the flexible terms of the draft articles would be left to the injured State itself, subject, of course, to the scrutiny of other States and international organizations.

30. The most ambitious aspect of the chapter was the provision on collective countermeasures contained in article 54. The Nordic delegations commended the efforts to establish a public law enforcement system in the case of a breach of obligations owed to the international community as a whole.

31. It was acceptable that the articles should distinguish between the breach of regular obligations and the breach of obligations of great importance to the international community; the draft articles as they

stood, however, made unfortunate distinctions between peremptory, or *jus cogens*, norms and obligations owed to the international community as a whole, or *erga omnes*. Part Two, chapter III, provided that in the case of serious breaches of peremptory norms all States should cooperate to bring an end to the breach and that no State should recognize as lawful a situation created by such a breach. In the case of obligations to the international community as a whole, on the other hand, article 48 provided that all States were entitled to demand cessation and specific performance. It was not clear why the two categories were treated separately and differently: why, for example, breaches of peremptory norms must be serious in order to give rise to the stated consequences, whereas breaches of obligations *erga omnes* were not so qualified, or why the duty of non-recognition was mentioned in regard to the former but not to the latter, apparently an intentional omission, since the commentary to article 48, paragraph 2, stated that the list of categories of claims was exhaustive.

32. It was generally agreed that the distinction between peremptory norms and obligations owed to the international community as a whole was obscure. Since the Commission's own commentary acknowledged that the two categories overlapped, as, for example, in the areas of aggression, basic human rights and the right of self-determination, questions would arise as to which regime was applicable.

33. Although unfortunately reduced to a simple saving clause, article 54, on measures by States other than an injured State, did go some way towards recognizing the principle that all States were entitled to take countermeasures in case of a violation of an obligation owed to the international community as a whole. It also reiterated the principle reflected in article 48 that States might call for cessation and reparation in the interest of beneficiaries of the obligation breached — such as individuals or groups of individuals — other than the injured State. Less fortunately, the wording of article 54 seemed to exclude the possibility of collective countermeasures in case of a breach of a *jus cogens* obligation unless it was simultaneously a breach of an obligation *erga omnes*, or at any rate to leave the matter open to dispute. To clarify the discrepancy between the two regimes, a link should be created between articles 41, 48 and 54, perhaps through a less restrictive wording of paragraph 3 of article 41.

34. Although some might be disappointed by the idea that the draft articles should be adopted as an annex to a General Assembly resolution, the Nordic delegations felt that that was the most appropriate form, one which would ensure the unity and rapid adoption of the draft articles and put them in the strongest position. Once so adopted, they would become the most authoritative statement available on questions of State responsibility, representing the condensation of customary law and all treaties and conventions touching on the matter. If they were to take the form of a convention, they would be subject to the whims of politics and eroded by the compromises inherent in a diplomatic conference. But as a restatement of customary law, the articles and related commentaries would remain the authoritative text until superseded by future international developments, as customs changed to reflect new principles and priorities.

35. **Mr. Bennouna** (Morocco) said that the draft articles on State responsibility, just completed after over 40 years of work, filled in some essential gaps in the architecture of international law by elaborating the secondary rules that set forth the consequences of breaches of the primary rules that States were obliged to follow. Some decades ago, the broad topic of State responsibility had wisely been narrowed to focus on the responsibility of States for internationally wrongful acts, as the newly adopted title sensibly indicated. As a result, other aspects of State responsibility not involving wrongfulness or even fault, but dealing with the actual damage caused, had been set aside to be dealt with separately under the heading of international liability for injurious consequences arising out of acts not prohibited by international law, with a focus on the prevention of transboundary harm. Diplomatic protection, that very specialized field of State responsibility, had also been earmarked for separate treatment.

36. Even thus narrowed, however, the draft articles on State responsibility constituted the keystone of the system. His delegation felt that the draft articles adopted by the Commission were well balanced and were for the most part a reflection of existing positive law.

37. His delegation shared the concern that the provisions on countermeasures might tend to legitimize their abuse by stronger States. However, it had been persuaded by the argument that the draft articles should, for that very reason, deal with a State's

response to a wrongful act by another State, so that the use of countermeasures could be kept within bounds. His delegation attached great importance to strict compliance with the conditions relating to resort to countermeasures in article 52, in particular the requirement of notification and negotiation prior to taking countermeasures; moreover, it interpreted the urgent countermeasures mentioned in article 52, paragraph 2, as being limited to the kinds of measures given as examples in the commentary, such as the freezing of assets.

38. His delegation hoped in time to see a dispute settlement mechanism developed to supplement article 52. It also attached the greatest importance to the provisions of article 50 that stipulated that countermeasures could not involve the threat or use of force or the violation of humanitarian law or other peremptory norms. It should be stressed that countermeasures in keeping with the draft articles must not be punitive but must be aimed at inducing a State to comply with its obligations.

39. A question not settled in the draft articles was whether individual countermeasures should cease as soon as collective countermeasures were taken by an international organization such as the United Nations. The draft articles were to be interpreted in conformity with the Charter of the United Nations, but the Charter itself was silent on the point with respect to measures not involving the use of armed force. It could be argued, however, by analogy with Article 51 of the Charter concerning the right of self-defence, that a State should cease its own countermeasures once the Security Council had ordered collective economic sanctions.

40. His delegation fully supported the Commission's wise decision to omit the controversial concept of international crimes of a State, and instead to draft articles on serious breaches of obligations under peremptory norms of general international law. The provisions codified consequences of breach of *jus cogens* norms that were already established in jurisprudence and complemented the notion of peremptory norms set forth in the Vienna Convention on the Law of Treaties. His delegation did not agree with the criticism that the Commission had ventured into the sphere of primary rules. Rather, it was drawing the consequences, on the level of secondary rules, by postulating the need for global cooperation in the face of a breach of such norms.

41. His delegation was surprised that the Commission had recommended that the General Assembly should merely take note of the draft articles in a resolution and annex the articles to the resolution, deferring to some indefinite time the idea of concluding a convention on that basis. It seemed a very inglorious outcome for so many decades of work on so vital a topic. The Commission was an expert body, which had submitted its best effort, but the task of deciding what should be done with it belonged to the political body, the General Assembly. Before such a decision was made, the monumental work surely merited in-depth consideration by an ad hoc group or an open-ended working group, which would refrain from reworking the details but would give further thought to the significant choices made.

42. **Mr. Mansfield** (New Zealand) said that the completion of the draft articles on the topic of State responsibility, which had been the result of dedicated efforts by past and present members of the Commission, represented a significant milestone. The work over the past quinquennium, in particular, had resulted in a valuable clarification of the relationship between the various parts of the draft articles and thereby the central concepts of the basis of responsibility. The draft articles were, as a consequence, comprehensive, well balanced and well structured. The Special Rapporteur's contribution was particularly commendable. It was most gratifying that the Commission's work in 2001 had addressed the comments made by States in the Sixth Committee at the fifty-fifth session of the General Assembly. Issues which had caused difficulties for States had been recast and solutions found. That would greatly assist the acceptance of the draft articles by States.

43. His delegation welcomed the retention of the provisions on serious breaches in chapter III of Part Two. The widely held concern that provision should be made for a situation where there had been a breach of an obligation owed to the international community and in which every State had an interest in ensuring compliance was well reflected in the draft articles. The change had contributed significantly to the balance of the text as a whole; it was a considerable achievement on the part of the Commission to find a solution to a difficult conceptual issue.

44. Part Three represented a significant advance in the conceptualization of the topic. Of particular importance was the shift from the concept of the

responsible State to the concept that a State had a right to invoke responsibility; and the recognition of the important distinction between injured States and States with a legal interest in the performance of an obligation was most welcome. His delegation agreed that States in the latter category should be able to invoke responsibility for the breach of an obligation, although they should not be entitled to receive the full range of remedies available to States which had suffered actual injury.

45. His delegation supported the inclusion of the provisions on countermeasures. The use of countermeasures to induce performance of an obligation was recognized in customary international law, as had been confirmed by the International Court of Justice. The Commission had clearly given careful thought to the possibility that the right to take countermeasures could be abused, and the draft articles were consequently well balanced, providing a framework that would deter such abuse and ensure that the application of countermeasures was both necessary and proportionate. The adoption of the provisions did not, however, alter in any way the basic principle that the application of countermeasures should not stand in place of dispute settlement and that countermeasures should not be imposed if attempts to resolve a dispute were continuing in good faith.

46. In that context, the fact that the provisions on collective countermeasures had been removed from the text — although his delegation might have been able to accept the concept — was an important step in making the draft articles acceptable to others. At the same time, it had been right to include article 54, since it did not prejudice the current position under international law of the right of a State with an interest in the performance of a legal obligation to take lawful measures that would ensure cessation of the breach and reparation in the interest of the injured State or States. Indeed, the inclusion of draft article 54 as a saving clause played an important role in the balance of the text as a whole, while the further development of principle and practice relating to the issue remained open.

47. In view of the fact that the draft articles represented both the codification and the progressive development of international law, the Commission had made a commendably careful recommendation to the Committee as to the form that the draft articles should take. Although it was to be hoped that they would be broadly acceptable to all States, the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and annex the text to the resolution struck an appropriate balance between a recognition of the significance of the completion of work on the topic and the need for States to be able to consider the draft articles in their entirety more fully before moving towards their adoption.

48. While fully acknowledging the views of States which would prefer the adoption of a convention, his delegation was concerned to ensure that the draft articles were given due consideration by States before any such decision was taken. The non-adoption of the draft articles for the time being did not detract from their current status in customary international law nor from their importance as a vital chapter in the development of international law. Indeed, the precipitate adoption of the draft articles as a convention could weaken the Commission's work, in that the draft articles constituted an internally consistent whole. While it was likely that all States, including his own, would have their own views on the individual elements of that whole, the articles should be assessed in their entirety. To negotiate the content of a convention based on the draft articles so soon after they had been made available to States entailed the danger that too much consideration would be given to individual elements of the text rather than the sum of its parts. It would be a mistake to move too soon to a process that might cause the Committee to go back over issues that had already been resolved and upset the existing careful balance.

49. Thus, while his delegation could support the Commission's recommendation that the Committee should restrict itself to taking note of the draft articles, it questioned whether it was necessary or desirable for any decision to be taken at all at the current session. The commentaries on the draft articles were extensive, and Governments, including his own, could not have absorbed them all. They should be given time to digest the report before taking any formal decision. That would not be to shelve the Commission's work but rather to give it the respect it deserved. The draft articles would in any case stand as an authoritative study of current rules, State practice and doctrine and, as such, would be the definitive source of the rules for the development of customary international law.

50. **Mr. Maréchal** (Belgium) said that the Commission's work on State responsibility over many

years probably constituted its most important achievement. The draft articles, which represented a significant advance in the codification of international law, would take their rightful place with the laws on treaties and the peaceful settlement of disputes. International law had, since the *Chorzow factory* case of 1928, considered State responsibility as the simple obligation of reparation for any breach of a commitment. Through the efforts of successive special rapporteurs, culminating in the tenure of Mr. James Crawford, the Commission had produced an impressive set of 59 draft articles and 300 pages of commentary.

51. The completion of the work on the topic would lead to greater harmony in international relations, since the draft articles were simple, clear and consistent. They maintained a balance between customary law and a number of innovative elements, including provisions relating to serious breaches of obligations to the international community as a whole, the definition of an injured State and countermeasures, all of which would tend to favour the progressive development of international law.

52. The Commission was to be commended for having jettisoned the controversial concept of international crimes of States and for instead adopting an approach which recognized the existence of a special category of particularly serious breaches, namely breaches of essential obligations to the international community, and made them subject to a more rigorous regime of state responsibility. It had thus determined that the development of the concepts of *jus cogens* and *erga omnes* obligations had consequences for secondary rules and should be reflected in the draft articles. Rather than establishing a distinction between international crimes and international delicts, it had adopted the concept of peremptory norms, which had the added benefit of being recognized by the Vienna Convention on the Law of Treaties.

53. The definition of an "injured State" took account of the growing diversity of international obligations and the distinction between injured States and States which, although not directly injured, nevertheless had a legal interest in the implementation of the obligation in question. Into that category came the rules governing international responsibility for attacks on human rights or on the provisions of international humanitarian law relating to *jus cogens*. The chapters devoted to general principles and to forms of reparation, which were clear, concise and well structured, were particularly relevant in the current circumstances. The Commission had found the right balance between forms of reparation based on the principle of full compensation and the flexibility required not to overburden the obligation of reparation.

54. The Commission had taken a risky step in attempting to regulate countermeasures in order to limit their use. However, the acknowledgement of the right to take countermeasures should indeed be accompanied by appropriate limitations on their use; they should be applied only in exceptional circumstances and with due regard for the current international situation and, if essential, they should be applied proportionately and objectively. In any case, they should not replace serious efforts at peaceful dispute settlement.

55. As for the action to be taken on the draft articles, his delegation could accept the Commission's recommendation that the General Assembly should deal with the topic stage by stage, initially noting the draft articles in the framework of a resolution and only then proceeding to the convocation of an intergovernmental conference to examine the draft articles with a view to adopting a treaty. As it stood, the text was the result of a compromise and there was certainly room for improvement. It was therefore to be hoped that more time would be allotted to the topic and that the text could be enhanced by further debates on doctrine and judicial decisions.

56. **Ms. Xue** Hanqin (China) commended the completion of the draft articles after 46 years of arduous effort on the part of the Commission. Generally speaking, the draft articles adopted on second reading were extremely rigorous in structure and rich in substance. The Commission had also attained a balanced text by carefully weighing different positions regarding various controversial issues, thus paving the way for its acceptance by all parties.

57. Chapter III of Part Two dealt with some of the most controversial issues arising during the course of the Commission's work. Her delegation was appreciative of the fact that the Commission had replaced the term "international crimes of States", first, by the term "serious breaches of obligations to the international community as a whole" and subsequently to "serious breaches of obligations under peremptory norms of general international law", where "serious breaches" were defined as "gross or systematic" failure

to fulfil such obligations. Given that article 53 of the Vienna Convention on the Law of Treaties contained a widely accepted definition of "peremptory norm", the phrase "obligations under peremptory norms of general international law" had a more definite meaning and was easier to comprehend.

58. Her delegation remained concerned, however, that the concept of "serious breaches" could still give rise to controversy in practice, since it was not clear who should judge whether an internationally wrongful act constituted a serious breach. If it was left to States, they might arrive at different conclusions, which would have repercussions on the provisions of draft article 41, paragraphs 1 and 2, and would thus adversely affect the stability of the international legal order. Security Council resolutions also entered the equation. There was a need to clarify whether in cases involving a threat to international peace and security, for example, obligations under the draft article could arise only after the Security Council resolution had been adopted.

59. With regard to article 48, her delegation accepted that any State other than an injured State might express an appropriate form of concern if the obligation breached was owed to a group of States or the international community as a whole, and might even demand that the responsible State should cease the internationally wrongful act; it doubted, however, whether it was appropriate to elevate such actions to the level of a State's legal responsibility. Moreover, China was concerned at the uncertainty in respect of the contents of the obligation breached, whether owed to a group of States for the protection of their collective interest or to the international community as a whole. Such an approach was likely to lead to controversy and abuse, for it was difficult to arrive at agreed criteria for judgement in such matters.

60. According to draft article 45 and paragraph 3 of draft article 48, if the injured State had waived its right, or was regarded as acquiescing in the loss of its right, to invoke the responsibility of the responsible State, no third State had the right to invoke that State's responsibility in its own interest. However, that did not seem consistent with the nature of the obligation breached, which according to article 48 had to be one "established for the protection of a collective interest of the group" or owed to the international community as a whole. In that light, it seemed that the injured State should not be entitled to waive its right unilaterally. Moreover, it was not clear whether a third State could invoke responsibility before the acquiescence of the injured State in the loss of its right was firmly established.

61. Another issue relevant to draft article 48 was the concept of "the beneficiaries of the obligation breached" in paragraph 2 (b), which appeared to confer on third States the right to invoke responsibility in the interest of individuals or other non-State entities, even if they were not nationals of the responsible State or of the third State concerned. The right so conferred was too broad and was likely to lead to disputes among the States involved.

62. The question of countermeasures had always been controversial. Her delegation had consistently argued that countermeasures were permissible under international law if taken by an injured State to compel cessation of the act and safeguard its interests. In order to prevent abuse of that right, however, appropriate restrictions must be placed on it. A proper balance had been struck in chapter II of Part Three, with the deletion of the provision in the original draft article 54 that enabled States other than the injured State to take countermeasures, and the introduction of a saving clause in the new draft article 54. However, the new article failed to define "lawful measures". If they included countermeasures, the new provision would have the same effect as the old one. His delegation maintained its objection to expanding the range of States entitled to take countermeasures and introducing collective elements such as "collective intervention" or "collective sanctions".

63. The new draft contained no provisions on dispute settlement. However, because State responsibility was such a sensitive and controversial topic, it was very important for the draft articles to feature the principle that States must abide strictly by the obligation to settle their disputes by peaceful means, in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. A mechanism for settling disputes arising from State responsibility could be adopted along the lines of the provision contained in the draft articles adopted on first reading. The General Assembly, in deciding on the conclusion of an international convention on State responsibility, should also decide whether such a mechanism should be included.

64. Her delegation had no objection to the recommendation in the report that the General

Assembly should take note of the draft articles in a resolution, and annex the draft articles to the resolution.

65. **Mr. Abraham** (France), while congratulating the members of the Commission on their report, expressed regret at the delay incurred in circulating it. The Secretariat should not regard publication on the Commission's web site as a substitute for publication in the official languages of the United Nations.

66. The current text of the draft articles on State responsibility showed considerable improvement on its predecessors. He welcomed the Special Rapporteur's decision to abandon the punitive logic of the draft adopted on first reading, and to avoid dwelling on the definition of the primary obligations supposedly breached. Paragraph 1 of the new draft article 40 contained a new definition of an internationally wrongful act. Instead of the language used in the 1969 Vienna Convention on the Law of Treaties, which referred to norms recognized by "the international community of States as a whole", a serious breach was now defined in relation to "a peremptory norm of general international law". It was not yet clear which rules could be so defined, so the new definition was no better than the old one. However, it was a useful way of avoiding the need to draw up a list of primary obligations.

67. Draft article 40 also drew a distinction between "serious" and other breaches, the former consisting of a "gross or systematic" failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law. That would make room for both "serious" and less serious breaches, for instance, of the obligation under Article 2, paragraph 4, of the Charter to refrain from the threat or use of force, and such a distinction could have undesirable consequences.

68. He welcomed the Commission's decision to delete paragraph 1 of the former draft article 42, requiring the responsible State to make reparation. However, the new paragraph 1 was ambiguous in its scope. He was afraid it might encourage some States to use countermeasures unlawfully.

69. France had suggested during the Committee's previous session that chapter III of Part Two should be deleted in its entirety, and he was still unpersuaded that it was necessary to retain it.

70. Concerning countermeasures, the International Court of Justice had affirmed, in the case concerning the Gabcikovo-Nagymaros Project, that they were lawful in circumstances which did not preclude their wrongfulness. His delegation would have preferred the title of Part One, chapter V, to be "Circumstances precluding responsibility", as a means of indicating that the draft articles dealt only with secondary rules.

71. His delegation held to the view that the provisions on countermeasures should not feature in the draft articles, which should be confined to provisions for reparation and for the cessation of the internationally wrongful act. However, chapter II of Part Two was a useful indication of the allowable extent of countermeasures, the rules for which had thus far been derived from customary international law and had been vague and controversial. The right to take countermeasures must be reconciled with the need to limit abuses of that right. In that regard, he supported the provisions on the proportionality of countermeasures and their cessation. Notwithstanding the prohibition in paragraph 3 of draft article 52 against taking countermeasures if the dispute was pending before a court or tribunal with the authority to make decisions binding upon the parties, he thought the injured State should be entitled to take "such urgent countermeasures as are necessary to preserve its rights" (draft article 52, para. 2), even in such circumstances. He welcomed the prohibition against taking or continuing them if the internationally wrongful act had ceased.

72. As for measures taken by States other than an injured State, he did not accept that draft article 54 was a "saving clause", since it implied that a State having only a legal interest in the matter could take countermeasures against the responsible State, for the sake of obtaining cessation or reparation in the interest of the injured State. That question should be explored in much greater detail.

73. On the question of dispute settlement, there was no reason to single out disputes arising from issues of State responsibility for a special ad hoc settlement procedure. Moreover, disputes about responsibility alone were rare; most disputes, though implying responsibility, were about matters of substance, and the settlement of disputes was covered by many of the principles and rules of general international law. He therefore welcomed the Commission's decision not to

include any provisions on dispute settlement in the draft.

74. Finally, as to the form of the draft articles, a General Assembly resolution with the text of the draft articles annexed could be an appropriate solution, to be followed by a recommendation by the General Assembly for a convention based on the draft articles. That had been the approach taken to the draft articles on State succession and its impact on the nationality of natural and legal persons

75. **Mr. Masud** (Pakistan) said that his delegation intended to make a single statement on some of the items on the Commission's agenda which were of direct interest to it.

76. On the topic of State responsibility, which covered a number of important and complex issues, his delegation felt that parts of the draft articles, such as those on countermeasures and measures taken by States other than an injured State, might create some problems. He therefore supported the Commission's recommendation on the holding of a diplomatic conference, in due course, to negotiate a convention on the basis of the draft articles. As for the recommendation that the General Assembly should adopt a resolution taking note of the draft, he suggested the text need not be annexed if that would cause difficulties for some delegations.

77. The draft articles on international liability for injurious consequences arising out of acts not prohibited by international law still required some work, and the adoption of a convention on the topic would be somewhat premature. The concept of significant transboundary harm had to be elaborated and clarified, along with the obligations of States to take all appropriate measures to prevent it and to require prior authorization of activities within the scope of the draft. He suggested that the Sixth Committee could set up a working group to continue work on the topic, pending the adoption of a convention.

78. On the topic of reservations to treaties, he expressed the view that the rules on reservations laid down in the Vienna Conventions on the Law of Treaties, on Succession of States in respect of Treaties and on the Law of Treaties between States and International Organizations or between International Organizations had worked well, and had acquired the status of customary norms. It might not be wise to derail them now. The regime of reservations incorporated in the first of those instruments struck a good balance between preserving the text of treaties, by requiring reservations to be compatible with their object and purpose, and the goal of universal participation. Pakistan did not draw any distinction, for the purpose of reservations, between human rights treaties and others; nor did the Vienna Convention on the Law of Treaties. If a different regime, prohibiting reservations, were established for human rights treaties, the aim of universal participation in those treaties would be impaired.

79. Nor did Pakistan favour the establishment of monitoring bodies to determine the nature or validity of reservations expressed by States, which would also hinder that objective. States should themselves ensure that their reservations were consistent with the object and purpose of the treaty. However, the Commission's work on the topic of reservations was designed to offer guidelines to States and would not alter the existing regime of the Vienna Convention; as such his delegation did not object to it.

80. Pakistan supported the Commission's work on diplomatic protection and on unilateral acts of States. It appreciated the cooperation between the Commission and other bodies, and was conscious of the importance of the International Law Seminar held regularly at the United Nations Office at Geneva. As decided by the Commission, its next session should be held at Geneva in two parts.

The meeting rose at 1.05 p.m.